

HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2) (b))

Description of the Case.

Criminal Appeal No. 1017 of 2001
(Old No. 468 of 1982)

Vijai Nai S/o Tota Ram ... Appellant

State Versus ... Respondent

Approved for reporting.

Not approved for reporting.

Date of Decision 4th December, 2004.

Initial of Judge.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No.1017 of 2001
(Old No. 468 of 1982)

Vijai Nai S/o Tota Ram,
R/o Mohalla Khalkha Kashipur,
District-Nainital

... Appellant

Versus

State

...Respondent.

Smt.Pushpa Joshi, learned counsel for the appellant,
Sri A. Rab, learned A.G.A. assisted by Sri Nanadan Singh Advocate.

Coram: **Hon'ble P.C.Verma,J.**
 Hon'ble B.C.Kandpal,J.

(Delivered by Hon'ble B.C. Kandpal, J.)

1. This criminal appeal arises out against the judgment and order dated 16.2.1982 passed by Sessions Judge, Nainital in Sessions trial No. 176 of 1979, State versus Vijai Nai and three others convicting and sentencing the accused/appellant Vijai Nai to imprisonment for life under Sec. 302 read with Sec. 34 of the Indian Penal Code.

2. Brief facts of the prosecution case are that on 12.3.1979 in Mohalla Puccakot, Kashipur, District Nainital four persons (accused) were asking for subscription for Holi. At about 7.45 p.m. when Dalpat (deceased) reached at the place on a cycle, the accused persons stopped his cycle and asked to give subscription for *Holi* to which he denied on which an altercation took place between them. Vijai Nai and Mohd. Illyas accused persons stabbed said Dalpat, as a result of which he fell down. He was rushed to the hospital but in the way he died.

3. The complainant Ram Ratan lodged the First Information Report Ext.Ka-1 on 12.3.1979 at 8.40 p.m. at the Police Station-Kashipur. After the registration of the case the inquest on the dead body of Dalpat

was prepared by S.I.-V.K.Juyal (P.W.13) in presence of P.W.7 Jagat Singh and thereafter the body of the deceased was sent for autopsy. Dr. M.Hussain, Medical Officer, L.D. Bhatt Hospital, Kashipur (P.W.12) conducted the post mortem on the body of the deceased on 13.3.1979 at 12.50 p.m. and found following ante mortem injuries on his person:-

1. *Stab wound 2 cm. X 0.75 cm. vertical with sharp cut edges right side chest, 5 cm. right of mid line from epigastric region and 8 cm. below and inward the right nipple. Cavity deep. Eighth costal cartilage was cut, the stab was going inward and downward. The pleura was cut, the front lower margin of right lung cut through and through 1.7 cm. X ½ cm. The diaphragm was perforated through and through. Front lower border of liver was cut in area 1.5 cm. through and through. The lesser curvature of stomach was perforated in area 1 cm. X ½ cm. The right pleural cavity contained blood and abdominal cavity contained blood.*

2. *Stab wound 2.5 cm. X 1 cm. X chest cavity deep on back, left side, just below scapula, left seventh rib was cut in lower border, on surface wound was oblique. The direction was downward and inward. The left chest wall was cut and perforated. The left pleura on back was perforated then left lung was punctured in posterior side, in area 1 cm. X ½ cm. deep. Pleural cavity contained blood.*

4. The investigating Officer Sri V.K.Juyal (P.W.13) recorded the statements of the witnesses on 13.3.1979. On 15.3.1979 he arrested the accused Vijay Nai and Mohd. Umar alias Tushan Dhobi at 11.00 p.m. On 18.3.1979 at the pointing out of accused Vijai Nai, the Investigating Officer recovered the knife by the side of Dhela Nadi which the accused used in the commission of crime in the presence of the witnesses and prepared the site plan. On 30.3.1979 accused Murari and on 15.5.1979 accused Mohd. Illyas surrendered themselves before the court. After completing the investigation, the Investigating Officer submitted the chargesheet against the accused persons on 23.5.1979.

5. After submission of the chargesheet the accused /appellant Vijay Nai alongwith other co-accused Mohd.Umar alias Tushan, Murari and Mohd.Illyas were committed to the Court of Sessions and the learned

Sessions Judge, Nainital on 14.4.1981 framed the charge under Sec. 302 read with Section 34 of the Indian Penal Code against them. All the accused denied of the charge levelled against them and claimed their trial.

6. The prosecution in support of its case produced P.W.1 Ram Ratan who is informant of the case, P.W.2 Ahmad Ali, P.W.3 Nathu Singh, P.W.4 Jamil Ahmad, P.W.5 Babu Ram, P.W.6 Fayyaz Ahmad, P.W.7 Jagat Singh, P.W.8 Amar Nath, P.W.9 Kunwar Sen, P.W.10 Lalman Singh, P.W.11 Sri B.D. Kandpal, P.W.12 Dr. M. Hussain, who conducted the postmortem on the deadbody of Dalpat and P.W.13 Sri V.K. Juyal, Investigating Officer.

7. After the evidence of the prosecution was over, the statement of the accused/appellant and other co-accused Mohd.Umar alias Tushan, Murari and Mohd.Illayas were recorded under Section 313 of the Criminal Procedure Code. The accused persons did not adduce any evidence in their defence.

8. The learned trial court after hearing the learned counsel for the parties and after perusal of the record acquitted Mohd.Umar alias Tushan, Murari and Mohd. Illyas for the charges under Sec. 302/34 I.P.C. giving them benefit of doubt. Accused Vijay Nai was found guilty by the learned trial court for an offence under Sec. 302 read with Sec. 34 of the I.P.C. and convicted him accordingly. He was sentenced for life imprisonment by the same judgment and order. Feeling aggrieved by the aforesaid impugned and order dated 16.2.1982 the accused/appellant Vijai Nai has come up in this appeal.

9. We have heard the learned counsel for the appellant and learned A.G.A. and perused the material on record.

10. In the instant case, the incident is alleged to have taken place on 12.03.1979 at about 7:45 p.m. at Hajriwale Kuan, near Mohalla Pacca, District Kashipur which is at a distance of 4 furlong from the reporting of

post Katoratal, P.S. Kashipur. The report of the incident was lodged by Ram Ratan (P.W.) on the same day i.e. on 12.03.1979 at 8:45 p.m. The evidence of Ram Ratan (P.W.1) shows that he has properly explained the time taken by him for going to the hospital and to scribe the report. On the perusal of the statement of Ram Ratan (P.W.1) there does not appear any delay in lodging the First Information Report. It is quite clear that the First Information Report in this case has been lodged quite promptly.

11. Learned counsel for the appellant on the other hand has referred to us the evidence of Ram Ratan (P.W.1) and on the basis of the same he has tried to argue that the report in fact was lodged late.

12. Our attention has also been invited towards Panchayatnama (Ex.Ka.4) in which it has been mentioned that the report of the incident was lodged on 12.03.1979 at 20:00 hours. It has been thus argued that the time of lodging the F.I.R. mentioned in the First Information Report (Ex. Ka. 1) is not correct.

13. Learned counsel for the appellant has invited our attention towards the deposition of Ram Ratan (P.W.1) wherein he has stated that he took the deceased Dalpat to the hospital from the place of occurrence and it took about 10 minutes and thereafter it again took half an hour in searching the doctor in the hospital. As per the deposition of this witness, further going from the hospital to the place of Chaudhary Sunder Singh scribed the First Information Report, it took 20 minutes and thereafter half an hour was taken in getting the report scribed. The informant further took another 20 minutes for reaching the police station. Therefore, on the basis of the said break-up deposed by the informant Ram Ratan (P.W.1), learned counsel for the appellant has tried to submit that the First Information Report was in fact lodged at the police station quite late and the police has shown the same anti timed.

14. In our opinion the argument is devoid of any force.

15. The informant is an illiterate person and in the evidence, he was not able to tell the time it had taken to give evidence before the court. The informant also could not tell the number of furlongs in a mile. Therefore, much weight cannot be attached to the aforesaid break-up of timings given by Ram Ratan (P.W.1). It is clear from Ex. Ka. 2 which is the Fard that the Investigating Officer had taken samples of blood stain and unstained earth from the place of occurrence, on the same day at 9:30 p.m. Therefore, it is quite obvious that the Investigating Officer could have gone to the place of occurrence only after a report of the incident could be lodged at police station. This circumstances itself indicates that the First Information Report was lodged promptly. V.K. Juyal (P.W.13) who is the Investigating Officer has deposed in his evidence that the report of the incident was given at police station on 12.03.1979 at 8:30 p.m. and thereafter, the investigation of the case was entrusted to him on the same day. According to the statement of Investigating Officer, after the report was lodged, he recorded the statement of Head Moharrir and only thereafter he along with some police officials went to the place of occurrence and all this process adopted by the Investigating Officer must have taken some time which ultimately shows that the report of the incident could be lodged at 8:40 p.m. as has been alleged by the prosecution.

16. As far as the inquest report Ex. Ka. 4 is concerned, it is quite clear that the time of lodging the report pertaining to the report has been mentioned as 12.03.1979 at 20:00 hours, but it appears to us that instead of recording the time of lodging the F.I.R. as 20.40 hours, the figure .40 could not be mentioned by mistake in the Panchayatnama. The Investigating Officer V.K. Juyal (P.W.13) was not cross-examined by the defence on this point. Inquest report (Ex. Ka. 4) was prepared on the next day i.e. 13.03.1979 and it is difficult to observe that for no reason the chick report and the G.D. would not have been prepared by that time. The time mentioned in the inquest report as 20:00 hours appears to be a sheer mistake and a result of clerical error. We are thus of the opinion that there is no delay in lodging the report about the incident.

17. The prosecution in order to adduce the ocular version has produced five eyewitnesses, namely, Nathu Singh (P.W.3), Jamil Ahmad (P.W.4), Fayyaz Ahmad (P.W.6), Amar Nath (P.W.8) and Kuwar Sen (P.W.9). Out of these witnesses, no doubt Jamil Ahmad (P.W.4) has turned hostile, but on the basis of his evidence, it cannot be said that the prosecution case can be belied. The incident took place near his shop and at the time of the incident he was present in his shop. He has fully supported the case of the prosecution that the appellant Vijay Nai along with his companion was present at the place of the occurrence at the time of the incident and these persons had been asking for donation for Holi. This witness has also supported the case of the prosecution that the deceased Dalpat had come to the place of occurrence and Vijai Nai and his associates solicited donation for Holi from him and on account of the same some altercation took place. This witness, however, in his cross-examination has deposed that he had not seen Vijay Nai appellant actually stabbing the deceased – Dalpat. Therefore, in our opinion, if the evidence of this witness is discarded even then there is sufficient evidence against the accused/appellant to prove his guilt.

18. Another eyewitness Kunwar Sen (P.W.9) has deposed in his evidence that at the time of the incident he was going to his house along with Amar Nath (P.W.8) and when these persons were purchasing cigarette/biri then the deceased Dalpat was passing through on a cycle and when deceased Dalpat reached near the shop on his cycle, then the appellant Vijay Nai along with his companion asked donation for Holi from him on which the deceased Dalpat told them that he did not have money. Some altercation took place between him and the accused persons. Thereafter, this witness saw that Vijay Nai stabbed the deceased Dalpat. The First Information Report (Ex. Ka. 1) shows that the incident had been told to the complainant by Kunwar Sen (P.W.9) as has been mentioned in the F.I.R. It is also pertinent to mention here that Kunwar Sen (P.W.9) who is the eyewitness of the occurrence has no enmity whatsoever with the accused/appellant. Hence, it does not stand to reason

that the accused/appellant had not committed this crime and there is no reason to falsely implicate him in the crime.

19. Learned counsel for the appellant has tried to develop the argument that the name of Illyas another accused does not find any place in the First Information Report and as per the deposition of Kunwar Sen (P.W.9), it was Illyas also who stabbed the deceased Dalpat and this fact indicates that Kunwar Sen (P.W.9) had not witnessed the incident.

20. In our opinion, in case, if the name of Illyas does not find any place in the F.I.R. then it must be a fit case to extend the benefit of doubt to Illyas but the appellant Vijai Nai is not going to get the benefit from the same as the specific role of stabbing has been attributed to the accused/appellant since the beginning of the case.

21. Amar Nath (P.W.8) another eyewitness has deposed in his deposition that on the date of the incident when he was going from Mohalla Katoratal to Mohalla Kila, he on the way stopped at the corner of Mohalla Khalsa in order to purchase biri/cigarette and there he found that the deceased Dalpat going on his cycle towards southern side and when the deceased reached near the shop of Tushan – a co-accused, he was stopped by the accused/appellant and his associates who had grappled with Dalpat deceased and thereafter Vijay Nai and his companion had stabbed the deceased Dalpat. The deposition of this witness reveals that he is quite positive that Vijay Nai – accused/appellant had stabbed the deceased.

22. Learned counsel for the appellant has argued that Amar Nath (P.W.8) is a chance witness hence, he could not be believed.

23. In our opinion this argument has no force because when the incident took place in a street, the passers-by would be the best natural witnesses. This witness has given consistent evidence and there is

nothing in his cross-examination, which may discredit his testimony. Moreover this witness has got no enmity with the accused/appellant.

24. Another eyewitness Fayyaz Ahmad (P.W.6) has, of course, given the evidence in favour of the prosecution but half-heartedly. He has not deposed that Illayas has stabbed Dalpat – deceased. However, as far as the Vijay Nai accused/appellant is concerned, this witness has deposed that he has stabbed the deceased Dalpat.

25. Nathu Singh (P.W.3) has also given the evidence half-heartedly. This witness has a shop near the place of occurrence. Although he has stated about the presence of all the accused persons and on their asking donation for Holi from the deceased Dalpat, the accused/appellant Vijay Nai and another accused Illayas stabbed him yet in his cross-examination he has deposed that he came out of the shop only after the stabbing was over.

26. In our opinion in case, if the evidence of Nathu Singh (P.W.3) is also discarded even then the case against Vijay Nai is proved from the evidence of Amar Nath (P.W.8) and Kunwar Sen (P.W.9) supported by the evidence of Fayyaz Ahmad (P.W.6).

27. The ocular version finds absolute support by the medical version as the medical version shows that the doctor has opined that the death of the deceased had taken place at the time of the incident as has been alleged by the prosecution on account of the injuries sustained by him. Therefore, the medical version supports the ocular version on the count that the deceased Dalpat was murdered on 12.03.1979 at the time of the incident as has been alleged by the prosecution.

28. The ocular version advanced by the prosecution is again supported by the evidence of the recovery of a button which is Ex. I found at the place of occurrence. The evidence shows that the Investigating Officer visited the place of occurrence on 12.03.1979 immediately after

the incident and found a button at the spot. The deposition of the Investigating Officer – V.K. Juyal (P.W.13) shows that he had deposed in his evidence that when on 15.03.1979 he arrested Vijai Nai accused/appellant, he was wearing a coat, but one button of the same was missing at that time. The said coat and the aforesaid button Ex. I recovered from the spot were sent to the chemical examiner who vide his report Ex. Ka. 20 have reported that the said button Ex. I tallied with the aforesaid button of the coat of accused/appellant Vijai Nai.

29. Again the evidence of Lalman Singh (P.W.10) and Dr. M. Hussain (P.W.12) shows that they have deposed that on 18.03.1979 a knife (Ex.III) was recovered at the instance of accused/appellant Vijay Nai and this knife was sent to chemical examiner for examination, who vide his report (Ex. Ka. 20) has reported that there was blood stained on the said knife. The evidence on record, therefore, clearly establishes this aspect that the death of the deceased was caused on account of the knife blow given by the accused/appellant. We are, therefore, of the view that the accused/appellant Vijai Nai is responsible for the death of deceased Dalpat.

30. As far as the conviction under Section 302 I.P.C. as well as sentence awarded there on passed by the trial court is concerned, the evidence if taken into account as well as the fact and scenario under which the alleged assault was given by the accused/appellant, the offence could not be Section 302 I.P.C. but at the best it would be under Section 304 Part – II.

31. From the evidence of the eyewitnesses, it is crystal clear that the accused/appellant and his associates as well as the deceased had some quarrel on the question of donation for Holi on the road and while the deceased and the accused were quarrelling each other, suddenly the accused/appellant took out the knife and gave the blow which hit the deceased resulting his death. On this fact it is difficult to hold that the accused/appellant gave the blow with the requisite intention of causing

murder of the deceased. The entire incident happened pursuant to a quarrel between the deceased and accused/appellant and his associates and that the appellant under these circumstances had no deliberate intention to cause the death of the deceased. Therefore, it is not possible for us to hold that the offence under Section 302 I.P.C. has been made out against the accused/appellant. The incident was a result of sudden quarrel between the deceased and the appellant and in that melee, the appellant used knife for causing injury to the deceased which ultimately resulted in his death.

32. Under the circumstances narrated above we are of the conclusion that the offence would thus only come under Section 304 Part II of the I.P.C.

33. The appeal is thus partly allowed. We, therefore, acquit the appellant Vijay Nai of the offence under Section 302 I.P.C. and instead find him guilty for the offence punishable under Section 304 Part II I.P.C. We accordingly sentence the appellant Vijay Nai to 7 (Seven) years rigorous imprisonment.

34. The record of the court below be returned immediately & learned C.J.M. concerned is directed to take appropriate steps in order to take the appellant Vijay Nai into custody to serve out the sentence imposed against him by this Court.

(B.C. Kandpal, J.)

(P.C. Verma, J.)

04.12.2004
ASWAL